



Signed: May 03, 2010

Leslie Tchaikovsky

LESLIE TCHAIKOVSKY
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re No. 09-43502 T
MICHAEL H. CLEMENT CORPORATION, Chapter 11
Debtor-in-Possession.

MEMORANDUM OF DECISION RE FEE APPLICATION

On December 16, 2009, Samuel E. Goldstein & Associates ("Goldstein"), special counsel for the above-captioned debtor (the "Debtor"), filed an application requesting interim allowance and payment of fees and costs incurred post-petition. An amended application (the "Amended Application") was filed on February 11, 2010. Both the original application and the Amended Application were opposed by Frank C. Alegre, Sr. and Helen C. Alegre as Trustees of the Frank C. Alegre and Helen C. Alegre Revocable Trust (hereinafter "Alegre"). The Amended Application came on for hearing on March 15, 2010. At the Court's directions, the parties filed post-hearing briefs. The Court's findings and conclusions are set forth below.

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BACKGROUND

The above-captioned chapter 11 case was filed on April 28, 2009, shortly before a scheduled trial in a state court action involving the Debtor and Alegre. The state court action had been initiated jointly by the Debtor and its principal, Michael Clement ("Clement"). Upon filing for bankruptcy, the Debtor removed the state court action to the bankruptcy court. Because the Debtor was the plaintiff, its prosecution was not subject to the automatic stay.

The Court approved Goldstein's employment by the Debtor as special counsel in the state court action on May 19, 2009. Prior to that date, on May 7, 2009, Alegre moved for remand of the state court action. The Court granted the motion, and the action was tried in state court. Judgment was entered against the Debtor on or about July 10, 2009. The judgment gave Alegre the right to recover his reasonable attorneys' fees and costs from the Debtor and Clement, the amounts of the fees and costs to be determined at a later date. The judgment is currently on appeal. Goldstein does not represent the Debtor in the appeal.

Goldstein filed his original fee application on December 16, 2009 and scheduled it for hearing on January 19, 2010. Alegre filed an opposition to the application on January 12, 2010. Goldstein filed a reply on January 18, 2010. At the hearing, the Court denied the application without prejudice due to improper service and formatting problems without addressing Alegre's objections.

The Amended Application was filed on February 11, 2010. Alegre filed a renewed opposition to the Amended Application on March 8,

1 2010. Goldstein filed a renewed reply. A hearing was conducted on
2 the Amended Application on March 15, 2010. At the hearing, counsel
3 for Alegre asserted objections with a specificity not included in its
4 opposition. The Court directed Alegre to put these objections in
5 writing. It set a briefing schedule so that the Debtor would have an
6 opportunity to respond and Alegre would have an opportunity to reply.
7 The parties complied with the briefing schedule.

8 **DISCUSSION**

9 **1. Original and Amended Applications, Objections, and March 15,** 10 **2010 Hearing**

11 In the original application, Goldstein sought allowance and
12 payment of fees totaling \$103,187.50 and costs totaling \$6,998.10 for
13 services provided and costs incurred between April 28, 2009 and
14 October 27, 2009. In the Amended Application, Goldstein sought
15 allowance and payment of fees totaling \$124,248 and costs totaling
16 \$3,056.14 for services provided and costs incurred between April 28,
17 2009 and January 26, 2010. The fees requested in the Amended
18 Application reflected 517 hours of services. The Application
19 disclosed that Goldstein had received \$235,000 from the Debtor pre-
20 petition for services provided and costs incurred pre-petition and
21 that he had an unpaid claim for pre-petition services and costs
22 totaling \$168,908.12.

23 The Amended Application contained a narrative summary of the
24 work performed post-petition, broken into projects as required by the
25 Court's guidelines. The Amended Application was supported by a
26 declaration to which was attached a line-by-line breakdown of the

1 services performed and costs incurred. The description of the
2 services performed was broken into the projects described in the
3 narrative summary.

4 On January 12, 2010, Alegre filed a detailed objection to the
5 original application. First, he contended that the application was
6 premature. Alegre reminded the Court that the state court action had
7 resulted in a judgment adverse to the Debtor. Although that judgment
8 was on appeal, Alegre contended that, until the appeal had been
9 decided, it was premature to determine whether Goldstein's services
10 were reasonably likely to benefit the bankruptcy estate as required
11 by 11 U.S.C. § 330.

12 More specifically, Alegre objected to the \$28,2795.50 in fees
13 and costs requested by Goldstein for services in connection with
14 Alegre's post-judgment motion for fees and costs. Alegre contended
15 that this motion had only been asserted against Clement and that the
16 automatic stay prevented him from asserting it against the Debtor.
17 Thus, the services provided by Goldstein in this category were for
18 the benefit of Clement only. In particular, Alegre objected to the
19 fees requested by Goldstein for attempting to obtain a statement of
20 decision with regard to the fee motion from the state court judge.
21 Alegre noted that the state court judge had characterized the request
22 as "borderline frivolous."

23 Alegre also objected to: (1) \$7,677.50 in fees requested for
24 services for which the time allocations were "clumped": i.e., more
25 than one task was described with no breakdown of the time spent on
26 each task, (2) \$3,687.50 in fees requested for services that were

1 inadequately described, and (3) \$5,943 in fees requested for services
2 for which the descriptions contained redactions. The line items in
3 question were identified in the objection. In sum, the specific
4 objections related to fees totaling \$45,586.50.

5 In his reply to the original application, Goldstein contended
6 that none of the services he provided were solely for the benefit of
7 Clement personally. He noted that Alegre was seeking \$1,000,000 in
8 attorneys' fees and \$50,000 in costs. The judgment stated that the
9 Debtor and Clement were jointly and severally liable for these fees
10 and costs. Moreover, Clement's liability for these fees and costs
11 would have a substantial effect on Clement's ability to contribute to
12 the Debtor's reorganization effort. In addition, Goldstein contended
13 he had requested a statement of decision on the advice of the
14 Debtor's appellate counsel because at least one published appellate
15 decision had based its adverse ruling on the absence of a statement
16 of decision.

17 Goldstein also disputed Alegre's contention that he was only
18 entitled to fees and costs if his services actually conferred a
19 benefit on the estate: i.e., if the appeal from the adverse state
20 court judgment was successful. He noted that the law is clear that
21 reasonableness is determined at the time the services are performed
22 and costs incurred, not in hindsight at the end of the litigation.
23 See 11 U.S.C. § 330(a)(3)(A)&(C); In re Mednet, 251 B.R. 103, 108
24 (Bankr. 9th Cir. 2000); In re Circle K Corp., 294 B.R. 111, 125
25 (Bankr. D. Ariz. 2003). Thus, his fee application was not premature.
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1 Finally, Goldstein characterized as nit-picking Alegre's
2 objections to certain time entries on the ground that the
3 descriptions of services were "clumped," the services were
4 inadequately described, or the descriptions contained redactions. He
5 contended that any "clumped" items set forth work on a single topic,
6 the descriptions were adequate if viewed in context, and the
7 redactions were necessary to protect privileged content.

8 After the Application was filed, on March 8, 2010, Alegre filed
9 a supplemental opposition. The supplemental opposition reiterated
10 briefly Alegre's contentions in the original opposition.¹ On March
11 12, 2010, Goldstein filed a supplemental reply. Goldstein asserted
12 that, by reiterating his previous objections, Alegre revealed that
13 he had not really reviewed the Application. Goldstein contended
14 that, in the Application, he had taken extreme care to comply with
15 the Court's guidelines as to the description of services and separate
16 listing of discrete tasks. In addition, he had eliminated virtually
17 all of the redactions.

18 At the March 15, 2010 hearing, Alegre asserted that none of the
19 costs incurred after July 10, 2009, the date of the adverse judgment,
20 were incurred for the benefit of the bankruptcy estate and should be
21 disallowed. He also made a series of objections to different
22 categories of services, citing to the page numbers of the time
23 entries. Given the number and specificity of these objections, the
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25 ¹The only additional objection raised by the objection filed
26 on March 8, 2010 was to a January 19, 2010 time entry representing
\$72 in fees. Goldstein has conceded that this fee should be
disallowed.

1 Court ordered Alegre to put them in writing. A briefing schedule was
2 established for him to do so, and deadlines were set for the filing
3 of Goldstein's response and Alegre's reply.

4 **2. Post-Hearing Briefs**

5 **A. Alegre's Post Hearing Opposition**

6 In his opening post-hearing brief, Alegre asserted that his
7 objections to Goldstein's fee application fell into three categories:
8 (1) fees for services that were not reasonably incurred, (2) fees for
9 services performed for Clement personally as opposed to the Debtor,
10 and (3) costs for services rendered after the judgment was entered
11 and thus incurred for Clement's benefit rather than the Debtor's.
12 These are discussed in more detail below.

13 **(1) Fees for Services Not Reasonably Incurred**

14 The fees for services that Alegre contended were not reasonably
15 incurred by Goldstein totaled \$5,992.50. Of this amount, \$4,768.50
16 represented work done on the appeal from an order imposing sanctions
17 against the Debtor and Clement due to discovery abuses, and \$1,224
18 represented work done correcting the deficiencies in Goldstein's
19 original fee application.

20 Alegre made several points with regard to his objection to the
21 fees requested for work done on the appeal from the sanction order.
22 First, he noted that the appeal was brought by both the Debtor and
23 Clement. Thus, at a minimum, the fees should be apportioned between
24 the two. Second, the work was not performed for the Debtor's
25 benefit, because the sanction award could not be enforced against the
26 Debtor due to the automatic stay. Third, one of the judges on the

1 appellate panel essentially characterized the appeal as frivolous.
2 Finally, all but \$1,192 was incurred after the appeal was decided,
3 in an attempt to have the appellate decision de-published. Alegre
4 contended that this work was not done for the benefit of the Debtor.

5 With respect to the work done correcting the deficiencies in
6 Goldstein's original fee application, Alegre's primary objection was
7 that Goldstein should not be compensated for correcting his own
8 mistakes. Moreover, he contended that the fees requested in this
9 category should be reduced due to Goldstein's "overreaching": i.e.,
10 his attempt to hold the estate liable for fees not incurred on the
11 Debtor's behalf, or at least not reasonably so.

12 **(2) Fees for Services Performed Only for Clement**

13 Alegre contended that \$30,584 of the fees were for services that
14 were performed only for Clement's benefit. These services included
15 work done in connection with discovery issues, two motions for fees
16 filed by Alegre, Alegre's motion to require Clement to file an
17 undertaking to stay execution of the judgment, and Clement's motion
18 to strike Alegre's motion to tax costs.

19 Alegre noted that \$4,184 of the fees were described as having
20 been incurred for discovery matters. Alegre contended that \$2,222
21 of these fees were incurred taking the deposition of Alegre's trial
22 counsel, Steven Piser ("Piser"). He contended further that the
23 deposition was conducted in connection with Clement's opposition to
24 Alegre's motion for attorneys' fees and thus only benefitted Clement.
25 Alegre did not explain why the balance of the fees requested in this
26 category should be disallowed.

1 For the same reason, Alegre objected to the fees requested for
2 work done in connection with the two fee motions: i.e., \$8,461.50 and
3 \$6,019, respectively. These motions were asserted only against
4 Clement, not the Debtor, and only Clement, not the Debtor, objected
5 to the motions.

6 For the same reason, Alegre objected to the \$11,312.50 in fees
7 requested for opposing Alegre's motion to require an undertaking as
8 a condition of staying enforcement of the judgment pending appeal.
9 Due to the automatic stay, the judgment could not have been enforced
10 against the Debtor. Thus, the motion only affected Clement, and
11 Goldstein's services were only for Clement.

12 Again for the same reason, Alegre objected to \$6,626 in fees
13 requested for filing an opposition to Alegre's bill of costs after
14 trial. Because of the automatic stay, according to Alegre, the cost
15 bill could not be "assessed" against the Debtor. He contended that,
16 on August 31, 2009, he filed a document with the state court,
17 clarifying that the bill of costs was only directed against Clement.

18 **(3) Costs Incurred Only for Clement's Benefit**

19 Finally, Alegre contended that Goldstein was requesting
20 reimbursement of \$2,187.50 in costs incurred after entry of the
21 judgment on July 10, 2009. After that date, he contended, there were
22 no proceedings pending against the Debtor. Thus, the costs could
23 only have been incurred for Clement's benefit. For example, some of
24 the costs were presumably incurred in connection with Alegre's post-
25 judgment motion to tax costs. Due to the automatic stay, this motion
26 was only asserted against Clement.

1 **B. Goldstein's Post-Hearing Brief**

2 In his response to Alegre's post-hearing opening brief,
3 Goldstein noted that, at the March 15, 2010 hearing, Alegre had
4 contended that approximately 80 percent of his requested fees and
5 costs should be disallowed. He noted that, in his post-hearing
6 brief, Alegre has stated grounds for disallowing only approximately
7 \$38,000 of Goldstein's fees and costs.

8 Goldstein noted that Alegre's primary objection was that the
9 services giving rise to the fees were performed only for Clement's
10 benefit, not for the Debtor's. However, Goldstein noted, prior to
11 the trial, Clement had assigned his interest in the litigation to the
12 Debtor. Thus, all of the services he performed were for the Debtor's
13 benefit. Goldstein contended that the state court judge had been
14 advised of the assignment and should not have permitted Clement to
15 be named in the judgment. Moreover, even if the judgment cannot be
16 enforced against the Debtor at present, the Debtor will ultimately
17 be liable for those fees and costs since the judgment held the Debtor
18 and Clement jointly and severally liable.

19 Goldstein asserted that the \$5,992.50 in fees incurred in
20 connection with the appeal from the sanction award and to amend the
21 original fee application were reasonably incurred. He conceded that
22 one of the appellate judges on the sanction appeal expressed the
23 opinion that the appeal was unreasonable. However, Goldstein
24 respectfully disagreed with that statement. Goldstein also asserted
25 that it was reasonable to attempt to have the appellate decision de-
26 published and that these services were performed for the Debtor's

1 benefit. Finally, the \$1,244 in fees incurred to prepare the Amended
2 Application were not just incurred to correct deficiencies in the
3 original application. Additional work was required because the
4 Amended Application covered an additional time period. Goldstein
5 noted that the amount he was requesting was within the Court's
6 guideline limit of five percent of the total application amount.

7 Goldstein also disagreed with Alegre's contention that
8 \$32,771.50 of the fees and costs requested were incurred solely for
9 Clement's benefit. He conceded that the services performed that gave
10 rise to these fees were performed in connection with matters that,
11 on their faces, were only directed against Clement. However, he
12 contended that the services were nevertheless necessary for several
13 reasons.

14 First, based on the language of the judgment, the Debtor was
15 jointly and severally liable for any fees and costs assessed.
16 Second, Alegre's motion for fees and costs was originally asserted
17 against both Clement and the Debtor. Third, since Clement had
18 assigned his interest in the action to the Debtor, Clement was no
19 longer really a party to the state court action. As a result, the
20 services were performed only for the Debtor's benefit. Third,
21 Clement was the Debtor's principal whom the Debtor is bound to
22 indemnify.

23 **C. Alegre's Post-Hearing Reply**

24 In reply, Alegre took issue with Goldstein's assertion that the
25 judgment held the Debtor and Clement jointly and severally liable for
26 Alegre's fees and costs. He quoted the language of the judgment and

1 attached a copy of it to the declaration executed by Piser.
2 Similarly, he quoted from the language of the fee order, noting that
3 it named only Clement, not the Debtor. A copy of the fee order is
4 also attached to Piser's declaration. Alegre also asserted that the
5 cost bill was not directed against the Debtor. However, no copy of
6 the cost bill was attached to Piser's declaration.

7 Alegre noted that Goldstein did not dispute that the motion to
8 require an undertaking only pertained to Clement. He disparaged
9 Goldstein's argument that enforcement of the judgment against Clement
10 would have interfered with the bankruptcy case. Moreover, he argued
11 that, if this were so, relief should have been sought from the
12 bankruptcy court.

13 Alegre characterized as frivolous Goldstein's contention that
14 Clement's assignment to the Debtor of his interest in the litigation
15 rendered the Debtor the only remaining target of the post-trial
16 motions. First, he noted that Goldstein attached only a portion of
17 the transcript of the state court hearing in support of this
18 argument. He provided an additional portion of the transcript,
19 evidencing Goldstein's insistence that Clement be retained as a
20 "nominal" party in the case.² Moreover, he noted that state law did
21 not permit an obligee to eliminate his liability to an obligor by
22 assigning it to a third party without the obligor's consent. In
23 support of this contention, Alegre cited Cal. Civ. Code § 1457,
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26 ²Goldstein filed an objection to Alegre's submission of new
evidence to the Court in his reply, characterizing it as
"sandbagging."

1 Britschqi v. McCall, 41 Cal. 2d 138, 144 (1953) and Baer v.
2 Associated Life Ins. Co., 202 Cal. App. 3d 117, 124 (1988).

3 Finally, Alegre contended that the fees requested for work in
4 connection with the appeal of the sanction order was unreasonable.
5 First, approximately \$5,000 of the fees requested was for work
6 performed long after the briefing process was complete. Second, a
7 substantial portion of the fees requested related to the attempt to
8 have the appellate decision de-published.

9 **3. Decision**

10 **A. Was Application Premature?**

11 As noted above, in his objection to the original application and
12 the Amended Application, Alegre raised a blanket objection to the fee
13 application on the ground that it was premature: i.e., that the
14 reasonableness of the fees and costs could only be determined after
15 the appeal had been decided. This objection was not reiterated in
16 the post-hearing briefs and may have been abandoned. If not,
17 however, the Court overrules it. Such a position would require any
18 debtor wishing to appeal an adverse judgment to obtain counsel on a
19 contingency fee basis. This might not always be possible. When an
20 appeal was nevertheless meritorious, the debtor's inability to obtain
21 counsel would result in a windfall to the appellee. Moreover, the
22 services provided here were not really in connection with the appeal.
23 Rather, they were post-trial matters directly connected to the
24 judgment.

1 **B. Were Fees Reasonably Incurred?**

2 In the post-hearing brief, as noted above, Alegre objected to
3 \$5,992.50 of the fees as not reasonably incurred: (1) \$4,768.50
4 incurred in connection with the appeal from the sanction order, all
5 but \$1,192 of which was incurred in an effort to prevent publication
6 of the appellate opinion, and (2) \$1,224 to correct deficiencies in
7 the original fee application. The Court has considered the arguments
8 of the parties with respect to these fees. It concludes that the
9 attempt to prevent publication of the appellate opinion was not
10 reasonably for the benefit of the estate. In the Court's view, these
11 services were primarily incurred for Goldstein's benefit. Thus, the
12 \$4,768.50 in fees requested for this effort will be disallowed.

13 The Court finds that the additional \$1,192 in fees for the
14 appeal of the sanction order were reasonably incurred for the benefit
15 of the estate. The comment by one of the appellate judges at the
16 hearing on the appeal is insufficient to persuade the Court
17 otherwise. However, these services were also incurred for the
18 Clement's benefit, and the estate should only be charged with half
19 of the fees or \$596. Thus, the fees sought by Goldstein in this
20 category will be reduced by \$5,396.50 (\$5,992.50 less \$596).

21 The Court will also allow only half of the remaining \$1,192 in
22 fees incurred correcting the deficiencies in the original fee
23 application. Alegre is correct that the estate should not be charged
24 for the correction of errors. However, Goldstein is correct that the
25 Amended Application required additional work since it covered an
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1 extended time frame. As a result, \$546 of this portion of the fees
2 requested will be allowed, and an equal amount will be disallowed.

3 **C. Were Fees Incurred Solely for the Benefit of Clement?**

4 In the post-hearing brief, Alegre also objected to various
5 categories of services provided by Goldstein as having been incurred
6 only for the benefit of Clement: (1) post-judgment discovery, (2)
7 oppositions to two motions for fees, (3) opposition to Alegre's
8 motion to require an undertaking as a condition of a stay of
9 execution, and (4) opposition to motion to tax costs. Alegre noted
10 that all of this post-judgment activity was directed solely against
11 Clement as he believed that the automatic stay prevented him from
12 proceeding any further against the Debtor.

13 Goldstein made a series of arguments as to why these activities
14 implicated the Debtor as well as Clement, and in some respects only
15 the Debtor. The Court found none of his arguments persuasive.³ As
16 a result, all of the fees incurred in these categories will be
17 disallowed as a claim against the estate. The fees in this category
18 totaled \$30,584.

19 **D. Formatting Issues**

20 Alegre's objections to the original and Amended Applications
21 also raised issues concerning the format of the applications. Alegre
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24 ³Goldstein objected to Alegre attaching evidence in support of
25 his reply brief, characterizing it as "sandbagging." This
26 objection is overruled. The evidence was provided to refute
inaccurate contentions made by Goldstein in his response to
Alegre's post-hearing brief. Goldstein does not challenge the
authenticity of the evidence provided--i.e., a portion of a
transcript from a state court hearing and a copy of the judgment.

1 contended that, with respect to the original application, \$7,677.50
2 in fees were requested for services for which the time allocations
3 were "clumped," \$3,687.50 in fees were requested for services which
4 were inadequately described, and \$5,943 in fees were requested for
5 services the descriptions of which contained redactions. In his
6 subsequent objection, Alegre contended that the Amended Application
7 contained the same problems as the original application. Goldstein
8 responded that Alegre had obviously not reviewed the Amended
9 Application carefully because he had removed the redactions.
10 Goldstein contended that the other descriptions objected to had
11 either been revised or were adequate.

12 The Court has reviewed the time entries attached to both the
13 original application and the Amended Application. The Court agrees
14 with Goldstein that the redactions have been eliminated. As a
15 result, this objection is overruled. The other two objections are
16 also overruled. The Court finds the descriptions of the services
17 provided to be sufficient and any clumping to be negligible.
18 Therefore, no further reduction in the fees requested will be
19 required.

20 **E. Cost Request**

21 Finally, Alegre objected to the \$2,187.50 in costs incurred
22 after the judgment was entered. Goldstein made no coherent response
23 to this objection. Thus, the costs requested will be reduced by this
24 amount.
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CONCLUSION

As noted above, in the Amended Application, Goldstein sought allowance and payment of fees totaling \$124,248 and costs totaling \$3,056.14 for services provided and costs incurred between April 28, 2009 and January 26, 2010. The Court concludes that of these amounts, the following reductions should be applied: \$5,396.50 for work done on the appeal of the sanctions order, \$546 for work done correcting the original fee application, and \$30,584 for services incurred only for Clement's benefit. Thus, a total of \$36,526.50 of the fees requested will be disallowed, and \$87,721.50 in fees will be allowed on an interim basis. The cost reimbursement request of \$3,056.14 should be reduced by \$2,187.50, resulting in allowance of costs on an interim basis in the amount of \$868.64. Goldstein is directed to submit a proposed form of order in accordance with this decision.

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COURT SERVICE LIST

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